No. 86 1773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Petitioner,

vs.

WILLIAM M. MADDEN, Acting Director of the Administrative Office of the Illinois Courts,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

(a) Did the Illinois Supreme Court act as the judge of its own case in violation of Petitioner's due process rights when it had its own agent and acting administrator sue Petitioner and thereby brought before itself, as a trial court of original jurisdiction, a mandamus action in which it upheld its own pre-announced position in a long and heated public funds audit dispute between said court and the Petitioner?

(b) Did the Illinois Supreme Court impermissibly prejudge the case which it brought before itself, by earlier making numerous extra-judicial statements and pronouncements of its position on controlling legal issues of the dispute throughout the pendency of the controversy?

(c) Are pecuniary interests the only interests which undermine fair adjudication in violation of due process where, as here, the mandamus decision directly advanced the state court's repeatedly declared goal of securing a restrictive audit of its funds while exempting its own administrative agencies from public audit scrutiny?

(d) Did the Illinois Supreme Court's self-initiated action threaten Petitioner's liberty and property interests where that court found substantial failure by Petitioner to perform his duties as Auditor General and where both the State Constitution and State Auditing Act expose him to loss of office for nonfeasance or failure to perform his official duties?

(e) Does the so-called "rule of necessity," heretofore utilized to justify adjudication by courts forced to deal reluctantly with issues on which they are arguably disqualified

for bias, have any application where the self-interested tribunal itself acted affirmatively in launching the suit and having the controversy brought before itself for adjudication? Did the state court disregard available recusal alternatives which could have avoided due process concerns by assigning the case to an impartial decisionmaker?

PARTIES TO THE PROCEEDINGS BELOW

The case caption, set forth above, names all formally designated parties in the original mandamus proceeding below, the judgment in which is hereby sought to be reviewed. However, Petitioner (hereinafter sometimes described as "Cronson" or "Auditor General") contends that the members of the Illinois Supreme Court (hereinafter sometimes referred to as "the court" or "state court") are the actual plaintiffs and real parties in interest in said proceeding,[1] acting through their own agent and employee Madden, as nominal plaintiff in the institution and prosecution of the action below wherein the court constituted itself a trial court to receive Madden's complaint for an original writ of mandamus.

[1] The members of the Illinois Supreme Court are the Honorable William G. Clark, Chief Justice, and Associate Justices, the Honorable Joseph H. Goldenhersh, Ben Miller, Thomas J. Moran, Howard C. Ryan, Seymour Simon and Daniel P. Ward.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ROBERT G. CRONSON, Auditor General of the State of Illinois, defendant in the underlying action, prays that a Writ of Certiorari issue to review the judgment of the Illinois Supreme Court described below.

OPINION BELOW

The opinion of the court is reported at 114 Ill.2d 504 and at 501 N.E.2d 1267 (Ill., 1986). The judgment order, opinion and special concurring opinion in the case below

are reproduced as Appendix ("App.") A hereto. These were entered and filed with the Clerk of the court on December 3, 1986 in the exercise of the state court's discretionary original mandamus jurisdiction. No petition for rehearing was filed. The writ of mandate issued January 2, 1987.

JURISDICTION

This Court has jurisdiction to review the judgment and opinion filed December 3, 1986 of the Court below by Writ of Certiorari pursuant to 28 U.S.C., Section 1257(3). On motion of Petitioner, an order was entered by Mr. Justice Stevens on February 20, 1987 extending to May 2, 1987, the time for filing this petition. It has been filed within such extension. The judgment of the Court below is final.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation and application of the following provisions:

> The Fourteenth Amendment to the United States Constitution which provides in pertinent part:
>
> > ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . ."

STATEMENT OF THE CASE

A. Introduction.

The following statement of the case describes a long public audit controversy between the Illinois Supreme Court and Illinois Auditor General Cronson which commenced in 1977 and continues to the present. Petitioner does not seek to raise for review by this Honorable Court any state law issue among those which emerged in the controversy next described. The following statement is intended only to give the background of the dispute and to illuminate how federal due process issues emerged in the *Madden* case below; also to show why Petitioner contends that in *Madden* the State Supreme Court commenced, tried and adjudicated its own case and actually was the real plaintiff and party in interest therein. Whether or not the decision of the Illinois court on specific state law audit issues was right or wrong as a matter of Illinois law is not the question raised. It is, however, Petitioner's contention that the decisional *process* was fatally flawed because the Illinois court tried and decided in its favor its own case in which it had an interest and thereby violated the Due Process Clause of the Fourteenth Amendment.

B. Background Of Audit Controversy Between The State Supreme Court And The Auditor General From Which Emerged The *Madden* Case Below.

Commencing in 1977, the Illinois court and the Auditor General disagreed over the authority and duty of Petitioner to audit as "public funds", under Article VIII, Sec-

tion 3 of the State constitution,[2] implemented by the Illinois State Auditing Act (1985 Ill.Rev.Stat., Ch. 15, Sec. 301-1 *et seq.*), registration and admission fees imposed by the court upon Illinois attorneys as a condition of practicing law. Those fees, and earnings from their investment, collected by the Attorney Registration and Disciplinary Commission ("Commission") and the State Board of Law Examiners ("Board"), as administrative agencies of the court, are held and expended for the regulation of the Bar pursuant to rules of court.

During the past ten (10) years the State Supreme Court has administratively refused to permit the Auditor General to conduct financial/compliance audits of those funds, contending that they are not subject to financial audit. The effect of this was to make the court's two agencies the only entities within any branch of Illinois government claiming immunity from public audit.

The court repeatedly and publicly announced as reasons for its refusal that it had "decided" or reached an "opinion" that 1) the funds received and expended by its two agencies are not "public funds" within the meaning of the Constitution (among other reasons, because they are not *appropriated* by the legislature); 2) that neither the Commission nor Board is a "state agency" within the mean-

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[2] "Section 3. *State Audit and Auditor General.*

(a) The General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly, by vote of three-fifths of the members elected to each house shall appoint an Auditor General and may remove him for cause by a similar vote. . .

(b) The Auditor General shall conduct the audit of public funds of the State. . ."

ing of the Illinois State Auditing Act implementing the constitution;[3] and 3) that any financial/compliance audits of the court's own agencies would violate the Illinois constitution's principle of "Separation of Powers" as an impermissible constitutional and legislative intrusion upon the Illinois Supreme Court's inherent judicial power. This position was advanced in a letter to Cronson from then Chief Justice Daniel Ward dated February 28, 1977, saying, in part:

> "The Court has examined this question and has asked me to advise that the funds of the Board and the Commission have not been considered to be public funds." (Memorandum in Support of Motion for Recusal at p. 3).

The Court's position was again articulated in a legal journal article written by the Illinois Supreme Court's then Administrator, the predecessor to Respondent Madden. ("Why the Illinois Attorney Registration and Disciplinary Commission Should Not Be Audited," 1981, 63 Chi.B. Rec. 78).

In four successive hearings before the Legislative Audit Commission ("LAC"), an Illinois legislative agency vested

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[3] The Illinois State Auditing Act (1985 Ill.Rev.Stat., Ch. 15, Section 1-1, *et seq.*) provides:

(a) This Act implements Article VIII, Section 3 of the Constitution and shall be construed in furtherance of those provisions.

(b) This Act is intended to provide a comprehensive and thorough post-audit of the obligation, expenditure, receipt and use of public funds of the State under the direction and control of the Auditor General. . .".

* * *

State agencies means all ". . . boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch. . ." (Sec. 1-7)

with authority to examine into the Auditor General's compliance with his auditing duties, that body sought the reasons for the state court's refusal to permit financial audits of the funds of its administrative sub-agencies. Speaking through two then Chief Justices, and the court's Administrator (predecessor to Madden), the court announced the three above mentioned grounds of exemption from public audit supporting its "decision" and "opinion" that the Commission and Board are beyond the reach of the Illinois constitutional and statutory audits in question. (Minutes of LAC hearings September 28, 1977, January 10, 1978, April 7, 1978 and November 28, 1979.) These extra-judicial pronouncements included statements reported in the minutes as follows:

> "(Mr. Justice Ward): The Supreme Court funds and the funds received by the judiciary from the legislature, that is public funds, are completely audited each year. . . . That is not a question before this Commission. We are dealing here with a question of the separation of powers of government (LAC hearing minutes, January 10, 1978, at p. 1).
>
> * * *
>
> The constitution provides that the Auditor General shall examine the public funds and we felt that if he did so, he would be vulnerable to a charge of exceeding his authority." (*Id.* at p. 2)
>
> "(Mr. Justice Goldenhersh): Representative Keane requested clarification of the finding which stated that the auditors had been informed by the court that the commission's funds are not public funds. Justice Goldenhersh said that this represented the considered opinion of the court *but that there had been no formal legal proceeding in which that determination was made.*
>
> * * *
>
> Justice Goldenhersh explained the rationale behind the court's opinion. He said that the court takes the

> position that these funds are not public funds. If they were, they would be placed in the State treasury and subject to appropriation control. The court does not believe these funds were intended for the purpose or belong in that category. He said it is a matter of constitutional principle. It seems though that if the funds were public funds, there would be an encroachment upon the constitutional powers of the court. . . ." (LAC hearing minutes, November 28, 1979 at p. 13 (Italics added))

While challenging public audit of its sub-agencies on the ground that fees are not appropriated, the court has maintained that funds which it receives by appropriation from the General Assembly (as involved in the *Madden* case below) must be submitted by the court to audit by the Auditor General. The court finds no "Separation of Powers" threat in that context; nor has it sought from the legislature "appropriation" of fees collected by the Commission and Board.

No Illinois court, prior to the majority opinion of Justice Goldenhersh in the *Madden* case below, had ever before adjudicated any of the three audit issues raised by the court as grounds for freeing its two administrative agencies, the Commission and Board, from public audit.[4] The exception here noted is found in the *Madden* majority opinion itself, reading thusly:

> "In 1977, the court directed the Board of Law Examiners (Board) and the Attorney Registration and

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[4] In fact, on July 20, 1982, the Illinois Attorney General issued a formal opinion holding that the Commission and Board were "state agencies" whose funds were "public funds" subject to audit under Article VIII, Section 3 of the Constitution, as implemented by the Illinois State Auditing Act; also holding that it was the Auditor General's duty to audit all such funds. (Ill. Atty. Gen. Op. No. 82-022)

> Disciplinary Commission (Commission) to refuse defendants' demand. . . . The refusal to permit the audit was based on the conclusion that since the funds collected and expended by the Board *were not subject to the appropriation provisions of Article VIII of the constitution, they were not 'public funds', within the contemplation of Article VIII* [the audit provisions of Section 3 thereof]. See App. p. 6 (Bracketed material and italics added)

Thus, in stages, the state court has moved from extrajudicial pronouncements of its views to a point where it has used its self-initiated case in *Madden* to adjudicate and give those views legal effect.

In actuality, for many years billions of dollars of state funds, whether or not held in the state treasury, derived from non-appropriated Illinois governmental sources such as license fees, penalties, rents, tolls, tuitions, and the like, have been expended without legislative appropriation and have been treated as public funds.[5] Since the effective date of the constitution of 1970, all non-appropriated funds of the State have been audited by the Auditor General with the exception of fees collected from Illinois attorneys by the Commission and Board under the orders of the Illinois Supreme Court.

In response to that court's refusal to give him access to the financial books of its two agencies, Cronson declined to continue auditing the court's regular appropriated accounts, a function he had performed through June 30, 1978.

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[5] The report of Roland Burris, Illinois Comptroller, for fiscal year 1984 reveals that over $4 billion of state funds received in that year, out of a total of approximately $17 billion were not appropriated by the legislature; nevertheless they were held either in the state treasury or by separate state agencies as public funds subject to all state regulatory measures.

He took this step on the ground that a partial audit of a state agency limited as to scope by the auditee itself is no audit at all and a breach of his duty; also, because he feared that submission to the court's extra-judicial definition of "public funds", as including only appropriated funds, would create a precedent threatening public accountability over literally billions of dollars of other non-appropriated funds described above.

The *Madden* case here at issue is the Illinois Supreme Court's answer to Cronson's refusal to conduct a partial audit of the court's financial books on such a "public funds" premise dictated as to scope by the court itself. When coupled with the court's administrative directions to its two sub-agencies to refuse Cronson access to their financial books, the *Madden* case became the vehicle enabling the Illinois Supreme Court to achieve its overall objective of enforcing a selective audit of its financial accounts on its own terms.

The events immediately preceding the filing of the *Madden* case here at issue are as follows: By letter dated December 11, 1984, the Court's then Administrative Director, Roy O. Gulley, requested Cronson to resume his earlier practice of a limited audit of the court's appropriated funds only. Petitioner responded stating his willingness to comply with the court's request but only on the condition that the court would permit funds collected by the court's agencies, the Commission and Board, to be included within the financial audits. This condition was unacceptable to the court and the *Madden* litigation ensued.

C. The Agent-Employee Relation Of Plaintiff Madden To The Illinois Supreme Court In The Case Below.

The clear agent-employee relationship of Mr. Madden to the State Court is accurately described in the special

concurring opinion of Justice Simon in the case below, as follows:

> "But we cannot and should not gloss over the realities of the situation. Mr. Madden, as Acting Director is an employee of the court and he serves at our pleasure. We cannot but acknowledge that this action could only be maintained with our approval * * * *this is still our lawsuit.* We cannot escape the fact that Mr. Madden works for us and is under our control." Appendix A attached (App. pp. 11, 12) (Italics added)

The state constitution describes Madden's role to the same effect.[6] He is an agent and employee of the court, chosen by it and serving at its pleasure. His responsibility under Article VI, Section 16 is simply to assist the Chief Justice on behalf of the court, in exercising the general administrative and supervisory authority over Illinois courts vested in the State Supreme Court.

D. Other Litigation Initiated Or Controlled By The Illinois Supreme Court Compounding Federal Due Process Problems Herein Raised.

During the succession of events described above leading to the filing of the *Madden* mandamus case, other litigation adverse to Cronson was pressed in a different forum,

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[6] Article VI, Section 16 of the Illinois Constitution provides in pertinent part:

> "Section 16. *Administration.*
>
> "General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff, who shall serve at its pleasure, to assist the Chief Justice in his duties. The Supreme Court may assign a Judge temporarily to any court . . ."

namely the Circuit Court of Cook County (*CBA, et al. v. Cronson,* No. 82 L 50131, filed July 26, 1982). There, Cronson's antagonists were not the court's administrator, Madden, but its two agencies, the Commission and Board. The lead plaintiff, Chicago Bar Association, was represented by counsel including the same attorney who subsequently was to represent Madden—and, in fact, the Illinois Supreme Court[7] in bringing the mandamus suit below. The object of the CBA suit was to block any public audit of the Commission and Board.

The legal grounds of plaintiffs in the *CBA* case precisely paralleled the extra-judicial interpretations previously announced by the Illinois Supreme Court with reference to the issues of "public funds", "state agencies" and asserted violation of the Separation of Powers doctrine.

At this point (August 23, 1982), seeking a prompt and final disposition of the entire audit controversy, the Auditor General filed in the Illinois Supreme Court in *People ex rel., etc. v. Attorney Registration and Disciplinary Commission, et al.,* cause No. 57179, a motion asking leave to file a petition for original mandamus. That initial motion was intended to bring before Illinois' highest court all audit issues, including the court's extra-judicial interpretation of "public funds" as embracing only "appropriated" funds; and also the issue of whether a partial audit of appropriated funds alone could properly be conducted by the Auditor General. The court then took Cronson's threshold motion under advisement and the Circuit Court case was stayed. Nothing further was heard

[7] "This attorney, in seeking authority to act as a Special Counsel to the State of Illinois, acknowledged that he was "representing the *Supreme Court* in filing a mandamus. . ." (App. D attached).

for 19 months until March 19, 1984, when the Illinois Supreme Court denied the motion.[8]

The Auditor General then petitioned the court for reconsideration and moved recusal of its members on procedural due process grounds and for appointment of an impartial substitute court as permitted by Article VI, Section 16 of the state constitution. (Appendix B-2 hereto attached, App. pp. 26-28, incl.) The court soon thereafter denied both rehearing and the motion for recusal.

The *CBA* case in the state Circuit Court, resumed following the nineteen(19) month delay, was followed by trial delays of approximately two more years. These resulted when the State Supreme Court's agencies filed a joint motion to prevent all discovery sought by the Auditor General relevant to the issues and the relationship of the Commission and Board to the Illinois Supreme Court. It was approximately a year later before such discovery was authorized to proceed.

As the case neared resolution before Circuit Court Judge James C. Murray, it was again interrupted when the State Supreme Court on January 29, 1986 relieved Judge Murray of his trial calendar and placed him on temporary assignment to fill a vacancy in the Appellate Court. Cronson then requested the Chief Justice of the Illinois Supreme Court to exercise his administrative authority to permit Judge Murray to finish the case and to rule on the motions for summary judgment pending before him. The request was denied and the trial calendar was assigned

[8] In contrast to the Illinois Supreme Court's inaction over nineteen months before rejecting the Auditor General's motion for leave to file his tendered complaint for original mandamus, that court later granted within 24-hours the similar motion of its Acting Administrator, Madden, for leave to file his complaint for original mandamus in the *Madden* case below.

anew to another Circuit judge. The latter ruled in favor of the two agencies and their ally, CBA, on April 21, 1987 in an opinion exactly parallelling the extra-judicial pronouncements of the Illinois Supreme Court on the issues as pressed by its two agencies throughout the CBA litigation, a decision exempting them from public audit scrutiny.[9]

E. Manner Of Raising The Federal Questions In The Case Below.

Upon being served with process in *Madden*, Cronson filed in the court below on April 15, 1986 his Special and Limited Appearance and Motion to Dismiss for Want of Jurisdiction on Due Process Grounds asserting that the state court was trying its own case and had prejudged the matter in violation of his federal due process rights (Appendix B-1 attached, App. p. 14). Attached to the motion were papers suggesting alternative means available for recusal and re-assignment of the case to an impartial substitute court. On May 14, 1986 that motion was denied by order of the court, Simon J., dissenting. Thereafter the Auditor General declined to participate further in the *Madden* case, in order to preserve his federal rights and to avoid the contention that he had generally appeared or waived his due process objections, a question which would have been for the Illinois court itself, to decide.

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[9] Revealing as to "due process" is the fact that the same attorney who brought before the Illinois Supreme Court the *Madden* mandamus has also from the outset been a lead attorney for the Chicago Bar Association in the Circuit Court case where he joined in briefs adverting to the *Madden* decision below as dispositive of the "public funds" issue adversely to Cronson; also wherein he wrote that it has been the "consistent opinion" of the state Supreme Court that the Commission and Board are not "state agencies" and do not handle "public funds", the fundamental issues before the trial court. (See Appendix D attached hereto, App. pp. 32 to 36, incl.).

The court set for accelerated[10] hearing on September 16, 1986 the complaint and submission of the case on the merits. By notice to the Auditor General and his legal counsel, the court "requested" their attendance before it and their participation in the oral argument of the case. Counsel for Cronson respectfully notified the court that its "request" could not be complied with for the reasons set forth in the Special and Limited Appearance and Motion to Dismiss on Due Process Grounds. On September 16, 1986, the court then heard the arguments of plaintiff, *Madden*, granting him leave to place in the record a belated response to the Auditor General's Special and Limited Appearance and Motion to Dismiss which had been denied on May 14, 1986; also allowing Madden to supplement the record in other respects. (See Appendix C hereto attached, App. p. 29). Attached to the Call of the Docket of said date was also an extraordinary statement read into the record by Chief Justice Clark, in effect censuring the Auditor General and his counsel for failure to appear and to participate in the substantive case as the court has requested them to do. (Appendix C attached at pp. 29-31).

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[10] When it became apparent that the state court would proceed to decide *Madden* on an accelerated basis, Cronson sought unsuccessfully to obtain federal declaratory and injunctive relief under 42 U.S.C. Section 1983 on the ground that the state court was trying its own case in violation of Cronson's due process rights. That litigation was dismissed on motion of the members of the Illinois court, on the grounds of federal abstention. *Cronson v. Clark, et al.*, 645 F.Supp. 793 (C.D. Ill. 1986). Subsequently, Cronson's appeal of that order to the United States Court of Appeals for the Seventh Circuit was dismissed on the grounds of lack of standing and absence of any cognizable federal question. *Cronson v. Clark, et al.*, 810 F.2d 662 (7th Cir. 1987). These denials of federal relief are the basis of a related petition for writ of certiorari now under preparation. It will be filed shortly together with a motion to consolidate with the instant petition.

REASONS FOR GRANTING THE WRIT

A.

THE *MADDEN* CASE WAS THE ILLINOIS SUPREME COURT'S OWN SUIT IN WHICH, IN FACT, IT WAS THE REAL PLAINTIFF AND PARTY IN INTEREST. IN SO ACTING, THE COURT VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The fundamental tenet of due process at issue here was clearly stated in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

This Honorable Court has also said that "every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law". *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). To the same effect see *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488 (1973) and *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267 (1972).

The principle is well summarized by a leading commentator as follows:

> "This maxim [no one ought to be a judge in his own cause] applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his

> sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and *when his own rights are in question, he has no authority to determine the cause.* Nor is it essential that the judge be a party named in the record; *if the suit is brought or defended in his interest . . . he is equally excluded as if he were the party named.*" (Cooley, Constitutional Law (7th Ed.) Chapter IX, p. 592). (Emphasis added)

This case presents an unprecedented effort by a state's highest court to call before itself for adjudication, a dispute in which the court itself is an interested party; one in which it had frequently displayed a passionate interest and partisan role leading it to adjudicate legal interpretations serving its own institutional goals and interests. The nature of the court's dual role of intermingling personal or administrative objectives with its judicial function is most compellingly revealed in the special concurring opinion of Justice Simon in *Madden,* excerpts from which are as follows:

> ". . . I concur specially because I believe *too little attention has been given to the appearance of impropriety which arises from our participation in this case.*
>
> * * * * *
>
> "The more difficult point is whether the court is in fact sitting in judgment of its own case. . . . But we cannot and should not gloss over the realities of the situation. Mr. Madden as Acting Director is an employee of the court, and he serves at our pleasure. We cannot but acknowledge that this action could only be maintained with our approval.
>
> ". . . Although the audit will not inure to our benefit—either financially or otherwise—apart from the interest we all have as citizens in a proper accounting of public funds, *this is still our lawsuit.* We cannot escape the fact that Mr. Madden works for us and is under our control. As is evidenced by newspaper

> editorials dubbing this case 'a bout with the referee,' there is surely the possibility that the public will perceive something improper is taking place. *It is this appearance of impropriety that makes me uncomfortable with hearing this case and would ordinarily require us to step aside.*" (Appendix A, App. pp. 11,12) (Emphasis added)

The majority in the *Madden* opinion simply refuses to come to grips with the court's relationship to its agent Madden and with the due process implications of this course of conduct. Unlike the candor of Justice Simon, the majority opinion merely dismisses the contention that the court is trying its own case with the expedient assertion that the contention is "without merit." No attempt is made to counter Justice Simon's admission of Madden's controlled relation to the court nor to seriously address the allegations contained in Petitioner's Special and Limited Appearance and Motion to Dismiss on Due Process Grounds, filed April 15, 1986 (denied without explanation by the court on May 14, 1986, (Simon J., dissenting)). (Appendix B-1 hereto attached)

Instead the majority opinion seems to recognize that the court is indeed trying its own case but seeks to justify its biased and conflicting position on a number of grounds. For example, in referring to Petitioner's charges of bias implicit in the extra-judicial prejudgments of members of the court and its representatives, the majority opinion argues that whether all the judges of this court, or any of them should recuse themselves does not affect the court's jurisdiction to decide the issues, be the decision right or wrong. (App. p. 8). This may be an invocation of self-conferred power in the name of "jurisdiction", but it is not an answer to the basic due process question of whether the Illinois court, in fact, commenced and tried the case below with disdain for principles of impartiality

and fairness required by the rule of *In re Murchison, supra* and its progeny.

Similarly, the majority opinion seemingly would excuse the Illinois Supreme Court for trying its own case by arguing that its prior announcements on legal issues were merely "administrative" exercises or a "decision" separate and distinct from any *judicial* action in *Madden*. The court adds that in any event, the interest of the justices was not "pecuniary", *ergo*, due process considerations are irrelevant (App. at 9). Finally, the majority opinion makes a passing reference to the ancient "rule of necessity", but perceives no need to consider its use because the court holds itself to be free of any due process violation. (*Id.*).

Just as action by administrative Bar regulatory agencies of a state supreme court constitutes "state action" in which the court itself becomes the real party in interest (see *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 53 L.Ed.2d 810, 821-22 (1977)), the same result necessarily occurs when a court Administrator as here acts for a state supreme court in launching and conducting litigation. In such a situation that court is unquestionably the true plaintiff and real party in interest. The resulting action is the court's own lawsuit. Cf. also *Hoover v. Ronwin*, 466 U.S. 558, 570-574 (1984).

When a court becomes a disputant and chooses to use its judicial authority to prevail against an adversary, the result is not only an unseemingly situation injurious to the administration of justice—it is flatly unconstitutional. We cannot believe that any reviewing court, including the Illinois Supreme Court, would condone a situation in which an inferior court enforced its wishes in a dispute directly affecting it, by causing its Clerk or other agent to file a suit before the court against an adversary. Yet, that is essentially what has occurred here.

This Honorable Court's supervisory intervention is thus imperative. The mandamus decree below should be reversed as a judicial nullity. Alternatively, and as a minimum, that decree should be vacated and remanded to the state court with directions to consider whether the "rule of necessity" is applicable or contrariwise, whether other means exist under Illinois law for the resolution of this controversy by a detached and impartial tribunal.

B.

IN ADDITION TO INITIATING THE *MADDEN* CASE AND RULING UPON ITS OWN STATUS AS AN AUDITEE, THE ILLINOIS SUPREME COURT HAD REPEATEDLY PREJUDGED THE LEGAL ISSUES THAT IT BROUGHT BEFORE ITSELF.

The Illinois court's self-initiated violation of the *Murchison* doctrine is exacerbated by an unusual history of prejudgment throughout the court's lengthy legal wrangle with the Auditor General. The extent of this prejudgment is made manifest by the concurring opinion of Mr. Justice Simon who said:

> ". . . *not all* of the current members of the court have taken a position with respect to the Commission and Board funds".

App. at p. 11; (Italics added)

Likewise, the Federal District judge who considered Petitioner's unsuccessful Section 1983 action for relief against the Illinois court's procedure, nonetheless was constrained to remark upon the prejudgments here at issue. While the District Court was unpersuaded that a due process violation occurred and refused to grant injunctive relief

against the continuation of *Madden* relying erroneously on grounds of federal abstention,[11] it noted:

> "In the present matter . . . complainant has presented the testimony and other communications of [Illinois Supreme] court members tending to show a possible prejudgment of the issues involved."

645 F.Supp. at 797.

On at least five (5) occasions between 1977 and the current date, the Illinois court below "decided" the issues at hand by pronouncing its legal positions on the scope of Cronson's audit authority; for example (letter from Chief Justice Ward; legal journal article published at 63 Chi. B. Rec. 78 (1981); and several appearances before the Illinois Audit Commission during 1977, 1978 and 1979. See Statement of the Case at pp. 5-7, inc'l *supra.*) This was done directly through one or more of the court's justices and indirectly, through court intermediaries including Mr. Madden's predecessor as court administrator. (*Id.*)

The unusual statement issued by the Chief Justice of the Illinois Supreme Court on September 16, 1986, (Appendix C attached hereto, App. p. 29), rebuking Petitioner and his ttorney for declining to appear generally and participate in the oral argument of *Madden* (thereby risking waiver of Cronson's special and limited appearance), is also revealing as to the court's highly partisan stance and the intensity of its involvement in the dispute.

While prejudgments of legal issues, standing alone, may not rise to the level of a constitutional violation (*cf.*, *Fed-*

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[11] This ruling, and its subsequent affirmance by the Seventh Circuit Court of Appeals in *Cronson v. Clark, et al.*, 810 F.2d 662 (7th Cir. 1987) is the subject of a separate Certiorari Petition to be filed shortly with this Court with an accompanying request for consolidation.

eral Trade Commission v. Cement Institute, 333 U.S. 683, 702-703 (1947), the instant indicia of predisposition and bias, *when combined* with the Illinois court's *Murchison* violation in calling its own case before itself, make it clear that a fundamental due process infringement has occurred which must be rectified.

C.

THE COURT BELOW HAS A DIRECT AND SUBSTANTIAL DISQUALIFYING INTEREST IN THE *MADDEN* CASE. ALTHOUGH NOT PECUNIARY IN NATURE, IT IS AN INTEREST WHICH TAINTS THE COURT'S PARTICIPATION IN MADDEN AS A DUE PROCESS VIOLATION.

It is conceded that the Illinois court's longstanding effort to limit the scope of public audits of the court's funds, particularly those collected by its two agencies, involves no pecuniary interest of any individual justice. However, Petitioner maintains that a pecuniary interest in the sense of a stake in money or property, is not the only disqualifying interest capable of undermining a fair and impartial adjudication as required by due process. Any personal or institutional bias and prejudgment of legal issues, whether or not involving monetary interest, which gets in the way of fair adjudication of a legal dispute is the real evil which *Murchison* condemns.

The record in this case shows that the Illinois Supreme Court has long been embroiled in a struggle with the Illinois Auditor General in which the court has become committed to legal positions from which it will not recede; positions which it justifies as "administrative" action and which it is determined to uphold come what may. This insistence upon enforcing its will upon the Auditor General to prevent him from auditing funds collected by the court's two administrative agencies, while mandating partial audit of its *appropriated* funds is every bit as per-

nicious in terms of due process violation as the situation where a court has a "pecuniary" interest in the outcome of its goals.

Thus, money alone is not the issue as this Honorable Court has repeatedly recognized. A non-pecuniary interest can be equally disqualifying as a matter of due process. *See, In re Murchison, supra,* (judge who presided as a one-man grand jury also presided over contempt proceedings relating to events in the grand jury proceedings); *Ward v. Village of Monroeville, supra,* (Mayor's adjudication of traffic fines, which contributed to city finances, violated due process); *Johnson v. Mississippi,* 403 U.S. 212, 29 L.Ed.2d 423 (1971) (participation of a judge enmeshed in matters involving petitioner violated due process); and *Mayberry v. Pennsylvania,* 400 U.S. 455, 27 L.Ed. 532, 540 (1970) (judge in a "running, bitter controversy").

In his concurring opinion in *Aetna Life Insurance Co. v. Lavoie,* ____ U.S. ____, 89 L.Ed.2d 823 (1986), Mr. Justice Brennan wrote:

> ". . . I do not understand by this language [requirement of direct, personal, substantial and pecuniary interest] that . . . the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation. Non-pecuniary interests, for example, have been found to require recusal as a matter of due process. (Citing *Murchison.*)
>
> . . . [A]n interest is sufficiently 'direct' if the outcome of the challenged proceeding *substantially advances the judge's opportunity to attain some desired goal* even if that goal is not attained in that proceeding." (89 L.Ed.2d at 838; Italics added.)

The *Madden* case squarely falls within this description. The Illinois court in its self-initiated *Madden* case has gone far to attain its desired goals through the exercise

of its judicial mandamus power in a case brought before it by its own agent-employee. For one thing it has ruled on its own status and responsibility as a governmental agency by ordering the defendant Cronson to audit the funds appropriated to the Supreme Court. In the process, it has conferred rights upon itself and imposed duties upon Petitioner. This, in and of itself, is an adjudication of a part of its dispute with the Auditor General, namely, whether such a partial audit is lawful. But the Illinois court has gone well beyond that point. Its majority opinion, asserts (App. pp. 6, 7) that the court's long refusal to permit the audit of the Commission and Board "was based on the conclusion that since the funds collected and expended by the Board and Commission are not subject to the appropriation provisions of Article VIII of the Constitution, they were not 'public funds' within the contemplation of Article VIII." The court then goes on to state (App. p. 7) that "[the] question whether those funds are 'public funds' is the issue in a cause pending in the Circuit Court of Cook County (*Chicago Bar Association v. Cronson*, No. 82 L 50131)."

Whether the state court's quoted statements above are intended as dicta in *Madden* or, as findings and adjudications on the basic "public funds" question is unclear. Either way, it is obvious that the Illinois Supreme Court reached out in its majority opinion in *Madden* and made it clear to every judge and court in the Illinois judicial system, including the Circuit Court of Cook County, that the state's highest court has considered and concluded that state funds which are not appropriated are not "public funds".

The majority opinion below (App. p. 9) holds out the possibility that members of the court might ultimately change their minds and come to a different conclusion concerning the public audit of its two agencies, presumably

through its later review of the *CBA* case decision. On the record of this case, such delayed due process, in a remote and conjectural future appeal, offers cold comfort to Petitioner. The Auditor General is entitled to due process at this time and the pendency of *CBA* does not in any way obviate his right to present relief. See *Ward v. Village of Monroeville, supra,* where the Court said:

> "Nor, in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State *eventually* offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." (401 U.S. at 61-62) (Italics added)

D.

THE AUDITOR GENERAL'S PROPERTY AND LIBERTY INTERESTS WERE AND ARE THREATENED BY THE STATE COURT'S ACTION.

This case is not simply an effort to litigate abstract intramural disputes among state officers in which Petitioner has no personal stake. To the contrary, the State Supreme Court's action in suing Cronson and the product of that action, a mandamus decree adversely reflecting on his performance in office, is directly and personally threatening to his property and liberty interests.

Petitioner is clearly a "tenured" official with a specific term of office under state law and thus has a property right. *See, e.g., Schultz v. Baumgart,* 738 F.2d 231, 234 (7th Cir. 1984). That right is jeopardized by a finding, as in *Madden,* that he has been in substance guilty of neglect of his official duty. Under Section 3 of Article VIII of the Illinois Constitution, he may be removed from office in mid-term "for cause" by a vote of the General Assembly. Section 3 also requires the Auditor General to

take the oath of office to "faithfully discharge the duties of the office". Cronson took that oath and desires to uphold it. The State Auditing Act in Section 206 (Ill. Rev. Stat. 1985, par. 302-6) provides that "causes" for removal include ". . . neglect of duty".

As noted earlier, the Attorney General of Illinois in 1982 ruled that it was the duty of the Auditor General to conduct financial audits of the funds collected and dispensed by the two agencies of the Illinois Supreme Court. (Ill. Atty. Gen. Op. No. 82-022)

Petitioner thus finds himself in a substantial legal dilemma. If he obeys the flawed decision of the Illinois court, which he asserts is a judicial nullity, he violates his official duty and oath particularly when that decision goes far to resolve the "public funds" issue in a manner designed to exempt the two agencies from public audit. If he acquieses in the court's faulty order, his position arguably becomes moot. If he defies the mandamus order, he is subject to contempt proceedings as a matter of settled state law. (*See, e.g., People ex rel. Eugiere v. Rice*, 290 Ill. App. 514, 8 N.E.2d 683 (1937). Such contempt proceedings obviously entail a potential personal deprivation of property or even loss of liberty.

E.

THE CONSTITUTIONAL INFRACTIONS IN QUESTION WERE NOT JUSTIFIED BY ANY "NECESSITY" AND IN FACT WERE CLEARLY AVOIDABLE; NUMEROUS ALTERNATIVE MEASURES EXIST UNDER STATE LAW WHEREBY THE STATE SUPREME COURT COULD HAVE STEPPED ASIDE.

Perhaps the most unfortunate aspect of this case is that it could have been avoided, had the Illinois Supreme Court acted with restraint and exercised its unquestioned authority to step aside and transfer the cause to impartial,

uninvolved judges. The election of the majority in *Madden* not to invoke the Rule of Necessity[12] is perhaps due to that court's realization that there are, in fact, numerous state law provisions (including the court's own rules) which would have enabled the court to transfer the case to an impartial decisionmaker. If this Honorable Court does not reverse outright, it should at the very least, vacate the *Madden* judgment and remand with instructions to consider all alternative means available under state law to avoid this unseemly departure from due process.

We present the following outline of state procedures for recusal and transfer to impartial judges, not to invite this Honorable Court's searching interpretation of state law, but rather, to illustrate the availability of those procedures which the court below chose to ignore. These alternate procedures were pointed out to the court below in an attachment to Cronson's Special and Limited Appearance and Motion to Dismiss filed April 15, 1986 (App. B-2 at App. p. 27).

First, Article VI, Section 16 of the Illinois Constitution delegates to the Illinois Supreme Court general and administrative supervisory authority over all courts of the state. It expressly authorizes the court to assign a judge temporarily to *any* court. The history of the provision found in the reports and debates of the Sixth Illinois Constitutional Convention makes it clear beyond a doubt that these temporary assignment provisions permit vertical as well as horizontal assignments among the three tiers of the state judicial system.

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[12] There is much reason to doubt whether the Rule of Necessity applies at all to a lawsuit arranged and brought by the court itself. There has been no decision of this Honorable Court dealing with such an anomalous situation.

Section 16 imposes no limits on the number of judges who may be assigned to temporary duty on the State Supreme Court. Thus, had the court recused itself, it possessed clear authority to appoint a full complement of seven judges to serve as an acting supreme court in this case. Eligible for appointment are all judges of the State Appellate Court and the circuit courts. Additionally, Article VI, Section 15 of the Illinois Constitution provides that a retired judge, with his consent, may be assigned to temporary service on any court. The Illinois Supreme Court has exercised that authority on many occasions, including the appointment of retired judges to serve on the State Supreme Court.

Precedent for such recusal action at the state supreme court level exists in numerous other jurisdictions where the constitutional powers to assign judges are no greater, and in some cases, less explicit than in the Illinois provisions. In *Mosk v. Superior Court of Los Angeles County*, 159 Cal.Rptr. 494, 601 P.2d 1030 (1979), six of the seven members of the California Supreme Court disqualified themselves and the Chief Justice appointed six temporary justices by lot. In *Yelle v. Kramer*, 83 Wash. 2d 464, 520 P.2d 927 (1974), the entire Washington Supreme Court disqualified itself and appointed a full temporary court of seven judges and, in *State Board of Law Examiners v. Spriggs*, 61 Wyo. 75, 155 P.2d 285 (1945), *cert. den.*, 325 U.S. 886, the full Wyoming Supreme Court disqualified itself and appointed substitute judges to serve in its stead.

Other state law provisions, including the Supreme Court's own rules, further confirm that mechanisms exist whereby the state court, if it had chosen to do so, could have stepped aside and thereby avoided the due process taint.

The Illinois Supreme Court rules, which are expressly made applicable to the justices themselves, provide, in

separate sections, for disqualification for "Financial Conflicts of Interest" (Rule 66) and "*Other* Conflicts of Interest" (Rule 67) Ill. Rev. Stat., Ch. 110A at Rule 67(a).

Continuing this theme, the Illinois Code of Civil Procedure provides, in pertinent part as follows:

> ". . . a change of venue in *any* civil action may be had in the following situations: (1) where the judge is a *party* or *interested* in the action, or his or her testimony is material. . . In any such situation a change of venue may be awarded by the court with or without the application of either party. . . (Italics added)
>
> * * *
>
> "(b) when a change of venue is granted it may be to some other judge in the same county, or in some other convenient county, to which there is no valid objection".

Ill. Rev. Stat., Ch. 110, Sec. 2-1001.

No construction of the above provisions by this Honorable Court is requested and none is required, for it is abundantly clear that the Illinois court at least should have *considered* their use as a means of detaching themselves from their legal clash with the Auditor General. Instead, the court below disregarded Cronson's averments of its disqualification, and affirmatively chose to retain the case and in fact, advance it swiftly to a conclusion.

For the above reasons, the judgment below, must at least be vacated and sent back to the Illinois Supreme Court for a meaningful consideration of the applicability of the Rule of Necessity as against the availability of alternate means of resolving this dispute without offense to procedural due process requirements.

CONCLUSION

Petitioner does not seek from this Honorable Court a resolution of any state law issue on the merits of the audit dispute. He seeks only one thing: a fair trial in a fair tribunal. The court below erred by having a subordinate bring before it for adjudication a dispute in which it was deeply enmeshed. It compounded this error by numerous prejudgments of the legal issues involved and by failing to consider state law recusal measures available to it which would have avoided the problem. Review and corrective action by this Honorable Court is necessary to avoid serious infringement, not only of the due process clause of the Fourteenth Amendment, but also of the basic guarantee that distinguishes constitutional government in the United States from arbitrary government.

Respectfully submitted,

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APPENDIX A

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of November, 1986.

Present:

William G. Clark, Chief Justice
Justice Daniel P. Ward
Justice Howard C. Ryan
Justice Seymour Simon
Justice Joseph H. Goldenhersh
Justice Thomas J. Moran
Justice Ben Miller

On the 3rd day of December, 1986, the Supreme Court entered the following judgment:

Mandamus

William M. Madden, Acting Director of the Administrative Office of the Illinois Courts,

Petitioner

No. 63255 v.

Robert G. Cronson, Auditor General of the State of Illinois,

Respondent

Writ issued per attached opinion.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 2nd day of January, 1987.

/s/ JULEANN HORNYAK, Clerk,
Supreme Court of the State of Illinois

Docket No. 63255—Agenda 30—September 1986.

WILLIAM M. MADDEN, Acting Director of the Administrative Office of the Illinois Courts, Plaintiff,

v.

ROBERT G. CRONSON, Auditor General, Defendant.

JUSTICE GOLDENHERSH delivered the opinion of the court:

Pursuant to our Rule 381(a) (87 Ill. 2d R. 381(a)), plaintiff, William M. Madden, in his capacity as the Acting Director of the Administrative Office of the Illinois Courts, filed a motion for leave to file a complaint requesting that this court issue a writ of *mandamus* ordering defendant, Robert G. Cronson, Auditor General, to audit the funds appropriated by the General Assembly to the Supreme Court and disbursed at its direction by the Administrative Office of the Illinois Courts. Plaintiff's motion was allowed.

The complaint alleged that during the period commencing with his appointment to the office of Auditor General, through June 30, 1978, defendant conducted financial audits of all public funds appropriated by the General Assembly to the Supreme Court; that from the end of fiscal year 1979 until the present, defendant has failed and refused to conduct such audits; that Roy O. Gulley, formerly Director of the Administrative Office of the Illinois Courts by letter dated December 11, 1985, requested that defendant audit said funds and that defendant refused to do so and persists in his refusal to conduct such audits.

Defendant filed a document styled "Special and limited appearance and motion to dismiss for want of jurisdiction based on due process grounds" in which he contends that this court is "disqualified and lacking in jurisdiction" for the reason that "it would be trying its own case in violation of [defendant's] due process rights." He states therein that plaintiff is "an agent and employee of the Supreme

Court" and that the instant action "could not conceivably have been filed by [plaintiff] except upon the express direction of the court and in its behalf." Defendant also alleges that the court is without jurisdiction "on due process grounds because of disqualifying bias in having prejudged adversely to [defendant] an issue of the [defendant's] auditing authority which is inseparably related to the issue presented in this cause." Defendant states that "he has not audited the funds appropriated to the court since the end of fiscal year 1978 due to his conviction that he may not perform fragmentary or selective audits." Defendant's motion was denied and a briefing schedule was set. Defendant advised the clerk of this court that for reasons stated in the "special and limited appearance," he would not file a brief. Subsequently, defendant instituted an action in the United States District Court for the Central District of Illinois seeking relief under section 1983 of the Civil Rights Act (42 U.S.C. sec. 1983 (1982)) and for an injunction to stay further proceedings in this court. The district court denied injunctive relief, and its order was affirmed by the Court of Appeals for the Seventh Circuit. The matter was set for oral argument before this court, and defendant did not appear.

The position taken by defendant apparently stems from the failure to distinguish between the issues in this case and those presented in a cause pending in the circuit court. Involved in the other cause is the question whether defendant is authorized to audit the funds of the Attorney Registration and Disciplinary Commission and the Board of Law Examiners. That question is irrelevant to the issues presented in this case.

Article VIII of the Constitution of 1970, in pertinent part, provides:

"SECTION 2. STATE FINANCE

* * *

(b) The General Assembly by law shall make appropriations for all expenditures of public funds by

the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year." Ill. Const. 1970, art. VIII, sec. 2(b).

"SECTION 3. STATE AUDIT AND AUDITOR GENERAL

(a) * * * The General Assembly, by a vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote. * * *

(b) The Auditor General shall conduct the audit of public funds of the State. He shall make additional reports and investigations as directed by the General Assembly. * * *" Ill. Const. 1970, art. VIII, secs. 3(a), (b).

The Illinois State Auditing Act (Ill. Rev. Stat. 1985, ch. 15, par. 301-1 *et seq.*), in pertinent part, provides:

" 'Public funds of the State' has the meaning ascribed to that term in Article VIII of the Constitution." Ill. Rev. Stat. 1985, ch. 15, par. 301-18.

In the exercise of its constitutional duty to regulate the admission and discipline of the bar, this court adopted Rules 702 (87 Ill. 2d R. 702) and 751 (103 Ill. 2d R. 751), which in pertinent part provide:

"Rule 702. Board of Law Examiners

(a) The Board of Law Examiners shall consist of five members of the bar, appointed by the Supreme Court, and each shall serve a term of three years and until his successor is duly appointed and qualified.

* * *

(c) The members of the board and the officers thereof shall receive such salaries as the court may provide and such further sum for necessary disbursements as may be approved by the court, all payable out of moneys received from applicants for admission to the bar as fees for examination and admission.

(d) The board shall audit annually the accounts of its treasurer and shall report to the court at each November term a detailed statement of its finances, together with such recommendations as shall seem advisable. All fees paid to the board in excess of its expenses shall be applied as the court may from time to time direct." 87 Ill. 2d Rules 702(a), (c), and (d).

"Rule 751. Attorney Registration and Disciplinary Commission.

(a) Authority of the Commission. The registration of, and disciplinary proceedings affecting, members of the Illinois bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission.

* * *

(e) Duties. The Commission shall have the following duties:

* * *

(5) To collect and administer the disciplinary fund provided for in Rule 755, and, on or before April 30 of each year, file with the court an accounting of the monies received and expended for disciplinary activities and a report of such activities for the previous calendar year. Such accounting and report shall be published by the court. There shall be an independent annual audit of the disciplinary fund as directed by the court, the expenses of which shall be paid out of the fund; * * *." 103 Ill. 2d Rules 751(a), (e)(5).

Defendant does not dispute that through June 30, 1978, he conducted audits of the funds appropriated to the court. In 1977, the court directed the Board of Law Examiners (Board) and the Attorney Registration and Disciplinary Commission (Commission) to refuse defendant's demand that he be permitted to conduct a performance audit of their records. The refusal to permit the audit was based on the conclusion that since the funds collected and expended by the Board and Commission were not subject to the appropriation provisions of article VIII of the Constitution, they were not "public funds" within the con-

templation of article VIII. The question whether those funds are "public funds" is the issue in a cause pending in the circuit court of Cook County (Chicago Bar Association v. Cronson, No. 82L50131).

Defendant, in his "special and limited appearance," is critical of this court for having denied his motion for leave to file an original action seeking the issuance of a writ of *mandamus* directing the Commission and Board to make their records available to defendant. This criticism conveniently overlooks the fact that the action involving the same issue was already pending in the circuit court.

In his "special and limited appearance" defendant urges that this court lacks jurisdiction because it is a real party in interest in this cause and cannot unbiasedly hear its own case. (See *In re Murchison* (1955), 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623.) Defendant argues that because plaintiff, whose constitutional duty is to "assist the Chief Justice in his duties" (Ill. Const. 1970, art VI, sec. 16), is an agent and employee of the Illinois Supreme Court, this action was obviously filed by plaintiff upon the express direction of the court and in its behalf.

Concerning the court's alleged lack of jurisdiction, defendant argues that because members of the court have expressed opinions pertinent to the court's refusal to permit defendant to audit Board and Commission funds and because the audit of those funds is not separable from that of appropriated funds, the court has prejudged the issue here. This, he argues, precludes a fair and impartial consideration of the issue and violates his right to due process. Defendant bases his conclusions concerning "prejudgment" on statements made by the Chief Justice and the Director of the Administrative Office during hearings before the Legislative Audit Commission in explaining the court's reasons for refusing to permit defendant's audit of the funds collected and disbursed by the Board and Commission. These statements, he asserts, evidence an "unyielding position" on the issues. (Legislative Audit Commission hearings, January 10, 1978, February 28, 1978, November 28, 1979.) Defendant asserts that several

members of the court have also expressed these same views in extrajudicial contexts. Defendant also points out that the court allowed, without delay, plaintiff's motion for leave to file a complaint for *mandamus* in this cause, but denied a similar motion by defendant.

Conceivably, these assertions might be relevant to the question whether all the judges of this court, or any one of them, should recuse themselves, but they do not affect this court's jurisdiction. This court's original jurisdiction in cases relating to *mandamus* stems from article VI of the Constitution of 1970. The court has jurisdiction to decide the issues, be the decision right or wrong, and its jurisdiction is not diminished by the conclusional assertions in defendant's "special and limited appearance."

Although not previously presented to this court, the Supreme Court in recent years has, on several occasions, considered the question of the nature and extent of the interest required to render a judge's failure to recuse himself a violation of due process. (*Aetna Life Insurance Co. v. Lavoie* (1986), ____ U.S. ____, 89 L. Ed. 2d 823, 106 S. Ct. 1580.) The rule distilled from the opinions is that the interest is violative of due process if it is "direct, personal, substantial, [and] pecuniary." (*Ward v. Village of Monroeville* (1972), 409 U.S. 57, 60, 34 L. Ed. 2d 267, 270, 93 S. Ct. 80, 83.) Applying either that test or the less stringent one advocated by Mr. Justice Brennan in his concurring opinion in *Aetna Life Insurance Co. v. Lavoie*, we hold that the judges of this court do not have an interest sufficiently direct or substantial so that their participation in the decision of this case is violative of due process.

The decision of the court to direct the Board and Commission to refuse to permit defendant to audit their respective accounts, upon which defendant's assertions of "prejudgment" and "bias" were based, was made in the course of the court's exercise of its authority to regulate the admission and discipline of the bar, and not as a decision in pending litigation. That decision, unlike the deci-

sion in *United States v. Will* (1980), 449 U.S. 200, 66 L. Ed. 2d 392, 101 S. Ct. 471, has no pecuniary effect on the individual justices of this court, and we are not persuaded that any member of the court, if the relevant authorities indicate otherwise, feels compelled to reach the same conclusion in a judicial proceeding as that reached in a prior administrative decision.

If there were any merit to defendant's contention, we would be required to consider the applicability of the common law rule of necessity. (See *United States v. Will* (1980), 449 U.S. 200, 66 L. Ed. 2d 392, 101 S. Ct. 471.) Because we find the contention to be without merit, we perceive no need to discuss the rule of necessity.

We consider now the merits of plaintiff's complaint. Article VIII of the Constitution clearly and unequivocally provides that the General Assembly "shall make appropriations for all expenditures of public funds by the State" (Ill. Const. 1970, art. VIII, sec. 2(b)) and that "[t]he Auditor General shall conduct the audit of public funds of the State" (Ill. Const. 1970, art. VIII, sec. 3(b)). Although the question whether the funds collected and disbursed by the Board and Commission are "public funds" is in issue in pending litigation, there is no question that the funds appropriated to the court are "public funds" within the contemplation of both article VIII of the Constitution and the Illinois State Auditing Act. The Act defines the scope of the Auditor General's jurisdiction (Ill. Rev. Stat. 1985, ch. 15, par. 303-1), provides for mandatory audits (Ill. Rev. Stat. 1985, ch. 15, par. 303-2), authorizes the Auditor General to adopt regulations establishing audit standards (Ill. Rev. Stat. 1985, ch. 15, par. 303-7), and provides that the term "public funds" has the same meaning in the Act as in the Constitution (Ill. Rev. Stat. 1985, ch. 15, pars. 301-18, 301-19). The Act also provides that the Auditor General report to the Audit Commission, the Speaker of the House, and the President of the Senate, "each instance in which a State agency fails to cooperate promptly and fully" with the office of the Auditor General, and authorizes the Auditor General to "institute and

maintain any action or proceeding to secure compliance with this Act and the regulations adopted hereunder" (Ill. Rev. Stat. 1985, ch. 15, par. 303-12). Neither the Constitution nor the Act, however, confers upon the Auditor General authority to refuse to conduct an audit mandated by the express provision of article VIII of the Constitution.

Since we have not been favored with a brief or an appearance on behalf of defendant, we are unable to say whether there is any contention that a regulation adopted under the statutory authority conferred upon defendant serves to relieve him of the obligation to complete the audit directed by article VIII. He contends in the limited and special appearance that the audit of the appropriated funds without an audit of the funds managed and disbursed by the Commission and the Board would violate standard accounting principles and that a "fragmented" audit is not permissible. This contention is utterly without merit. Those funds are completely segregated from appropriated funds and are neither turned over to the State Treasurer nor disbursed by the Comptroller. The accounts are audited by independent certified public accountants, and their reports are made public. We fail to perceive any reason that this arrangement, which prior to fiscal year 1979 presented no impediment to defendant's performing his duty, has suddenly done so. We note parenthetically that defendant has offered no explanation, and that no provision of the professional standards to which defendant refers in the special and limited appearance supports his position.

As was noted earlier in this opinion, the issue before us is not whether the Auditor General may audit the funds of the Board and Commission, but whether defendant has the nondiscretionary duty to audit the funds appropriated to the court by the General Assembly. Whether under the Constitution or the statute, or a combination of both, he is authorized to audit the funds of the Board and Commission, will ultimately be decided in the action presently pending in the circuit court. Any contention that this court should recuse itself can be considered at the appropriate time.

Mandamus is an extraordinary remedy appropriate to enforce as a matter of public right the performance of official duties by a public officer where no exercise of discretion on his part is involved. (*People ex rel. Dolan v. Dusher* (1952), 411 Ill. 535, 538; *People ex rel. Shultz v. Russel* (1920), 294 Ill. 283, 285.) That is the situation presented here, and the writ of *mandamus* will issue.

Writ issued.

JUSTICE SIMON, specially concurring:

I agree with the majority's conclusion that the Auditor General is obligated to audit funds appropriated to the court by the legislature and that we may compel him to do so in this proceeding. I concur specially because I believe too little attention has been given to the appearance of impropriety which arises from our participation in this case.

The Auditor General argues he is denied due process for two reasons: first, because individual justices of this court have made extrajudicial statements regarding their views on the question of the Auditor General's authority to audit the books of the Attorney Registration and Disciplinary Commission (Commission) and the Board of Law Examiners (Board); and second, because the court is the real plaintiff in interest here and is thus sitting in judgment of its own lawsuit. The first point is without merit. Not all the current members of the court have taken a position with respect to the Commission and Board funds. Moreover, statements regarding that separate controversy now pending in the circuit court of Cook County are too remote to require disqualification in this case.

The more difficult point is whether the court is in fact sitting in judgment of its own case. In one sense, the people of the State are the real party in interest here: it is they who deserve an accounting of the hundreds of millions of dollars appropriated by the legislature and expended by the court system since the last audit of these funds by the Auditor General. The plaintiff, Mr. Madden, is—in this sense—merely their representative. But we can-

not and should not gloss over the realities of the situation. Mr. Madden as Acting Director is an employee of the court, and he serves at our pleasure. We cannot but acknowledge that this action could only be maintained with our approval.

Despite this fact, I agree with the majority that our interest here is not of a magnitude or kind which implicates due process. If the Federal Constitution does not require our disqualification, however, the Code of Judicial Conduct, under normal circumstances, would. (See 87 Ill. 2d R. 61(c)(4); *cf. Southern Pacific Communications Co. v. American Telephone & Telegraph Co.* (D.C. Cir. 1984), 740 F.2d 980, 990 n.9 (reach of Federal statutes on judicial disqualification broader than due process).) Although the audit will not inure to our benefit—either financially or otherwise—apart from the interest we all have as citizens in a proper accounting of public funds, this is still our lawsuit. We cannot escape the fact that Mr. Madden works for us and is under our control. As is evidenced by newspaper editorials dubbing this case "a bout with the referee," there is surely the possibility that the public will perceive something improper is taking place. It is this appearance of impropriety that makes me uncomfortable with hearing this case and would ordinarily require us to step aside.

The difficulty with our recusal here is that it would result in a continuation of the inaction by the Auditor General which has frustrated the manifest constitutional design for an audit of this court's appropriated funds. If we cannot adjudicate the question of the Auditor General's responsibility, it will not be decided, and the Auditor General will continue to leave hundreds of millions of dollars appropriated by the legislature unaudited. Under the ancient "rule of necessity," even if a judge has an interest in the case, "where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be." (*United States v. Will* (1980), 449 U.S. 200, 214, 66 L. Ed. 2d 392, 405, 101 S. Ct. 471, 480, quoting *Philadelphia v. Fox* (1870), 64 Pa. 169, 185.) This is, in my judgment, such a situation.

Contrary to the Auditor General's suggestion, there is no constitutional authority for us to assign a "temporary acting Supreme Court" which could relieve us of the necessity of deciding this case. Although article VI, section 16 of the 1970 Constitution (Ill. Const. 1970, art. VI, sec. 16) gives us the power to "assign a Judge temporarily to any court," this provision cannot be read in isolation. Article VI, section 3, plainly states that the supreme court "shall consist of seven Judges." If assignment of a "temporary acting Supreme Court" were permissible, we would have 14 judges, not seven. Nothing in either provision suggests that the temporary-assignment authority can be exercised merely to "replace" a judge who has recused himself. As I understand the constitutional scheme, our power to make temporary assignments to this court, the sole court in this State for which the exact number of offices is defined in the constitution, extends only to filling vacancies in office.

The rule of necessity commands that, while we may wish to avoid doing so, we must decide this case. The public interest—as well as that of the members of the Supreme Court and the Acting Director—in knowing that public funds are being safeguarded requires us to determine whether an audit of funds appropriated by the legislature is indicated. I concur with the majority that the Auditor General has presented no reason why he cannot audit the appropriated funds. He has failed to make any showing of how an audit of the appropriated funds without an audit of the Commission and Board funds would violate accepted accounting principles. Nor can the Auditor General dispute that he currently conducts what he must characterize as "fragmentary or selective" audits by continuing to audit the moneys appropriated for the appellate court, which are a part of the overall legislative appropriation to this court. And, as pointed out by the majority, for several years he did audit the funds appropriated by the legislature to the Supreme Court without auditing the Commission and Board funds. I, therefore, agree that the writ of *mandamus* should issue.

APPENDIX B-1

IN THE NAME OF
THE PEOPLE OF THE STATE OF ILLINOIS
IN THE SUPREME COURT OF ILLINOIS

No. 63255 — MANDAMUS

WILLIAM M. MADDEN, Acting Director of the Administrative Office of the Illinois Courts,

Petitioner,

vs.

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Respondent.

RESPONDENT'S SPECIAL AND LIMITED APPEARANCE AND MOTION TO DISMISS FOR WANT OF JURISDICTION BASED ON DUE PROCESS GROUNDS

Now comes ROBERT G. CRONSON, Auditor General of the State of Illinois, Respondent herein, by SAMUEL W. WITWER, SR., RUBIN G. COHN, and SAMUEL W. WITWER, JR., Special Assistant Attorneys General of the State of Illinois, and enters his special and limited appearance moving the Court to dismiss this cause for lack of jurisdiction based on the Court's disqualification on due process grounds. In support and explanation of said motion, the following Statements and Suggestions are respectfully submitted:

1. *The Court Is Disqualified And Lacking In Jurisdiction Because It Would Be Trying Its Own Case In Violation Of Respondent's Due Process Rights.*

While filed in the name of William M. Madden, as Acting Director of the Administrative Office of the Illinois Courts, it is the Supreme Court which is the actual Petitioner and real party in interest in this cause, seeking to prosecute and adjudicate a proceeding which it has now initiated pertaining to a long-standing controversy between the Court and Respondent. The controversy concerns the authority and duty of Respondent to audit as public funds, pursuant to the mandate of Article VIII, Section 3 of the Illinois Constitution and Section 1-1 of the Illinois State Auditing Act (Ill.Rev.Stat., 1985, Ch. 15, sec. 301-1, *et seq.*) the funds of the Attorney Registration and Disciplinary Commission and the State Board of Law Examiners (Commission and Board respectively), both agencies being creations of and wholly controlled by the Supreme Court. Respondent contends that public audit of such funds is constitutionally mandated. The Supreme Court denies that this is so.

Petitioner Madden is an agent and employee of the Supreme Court, serving at its pleasure, whose responsibility under the Constitution of Illinois (Article VI, Section 16) is simply "to assist the Chief Justice" in discharging, in behalf of the Court, the general administrative and supervisory authority over the Illinois Court system vested in the Supreme Court. The instant suit could not conceivably have been filed by Petitioner except upon the express direction of the Court and in its behalf.

This fact is also demonstrated by the representations made by counsel for Petitioner to the Attorney General of Illinois when he sought authority to bring this suit as "Special Counsel to the State of Illinois", to the effect that he was "representing the Supreme Court in filing a mandamus as requested by William M. Madden as Acting Director of the Illinois Court." (Appendix A attached—letter dated March 10, 1986 from Neil F. Hartigan, Attorney General, and acceptance by Richard J. Phelan.)

The conclusion that this is the Court's own suit is inescapable and impossible of contradiction given the nature of Petitioner's employee status whose duties are wholly subject to determination and control by the Court. Therefore, since it is in fact and law the Supreme Court which has instituted this suit, it cannot sit in judgment upon its own case without violating a fundamental tenet of due process as expressed in numerous federal and state decisions, of which the following excerpt from the leading case *In re Murchinson*, 349 U.S. 133 (1955), is illustrative:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

The Court's order of March 27, 1986 granting leave to Mr. Madden to file the instant petition is a deprivation of due process of law in violation of Amendment XIV, Section 1 of the United States Constitution and Article I, Section 2 of the Illinois Constitution. Any subsequent proceedings in this Court predicated upon such leave would similarly violate those constitutional provisions.

2. *The Court Is Also Without Jurisdiction On Due Process Grounds Because Of Disqualifying Bias In Having Prejudged Adversely To Respondent An Issue Of The Respondent's Auditing Authority Which Is Inseparably Related To The Issue Presented In This Cause.*

In this cause, the Court seeks to compel the Respondent to audit the funds appropriated to it by the Legislature. Viewed in splendid isolation it would appear that Respondent is guilty of failing to discharge his auditing responsibility in respect to funds which are concededly public funds.

The issue, however, does not lend itself to such a simplistic formulation. Intertwined and inseparable is the

Court's refusal, since 1977, to permit the Respondent to audit the funds of the Commission and Board. The Court's publicly stated reasons, as will be further developed, are that 1) the funds received by and expended by the two agencies are not public funds within the meaning of the Constitution's mandate to the Respondent; 2) neither the Commission nor Board is a state agency within the meaning of the Illinois State Auditing Act which implements the constitutional auditing mandate; and 3) a financial/compliance audit of the funds in question would violate the Constitution's principle of Separation of Powers as an impermissible intrusion into the Court's judicial power.

Respondent disputes each of these contentions but of central importance to his position in the instant case is his contention that the mandate to audit public funds precludes him from making the divided audit now insisted upon by the Court. (Am. Inst. of CPA's Professional Standards, Part 1 AU Sec. 8013-23) He is quite willing, indeed anxious, to audit the funds appropriated to the Court by the Legislature, but only upon the condition that the additional funds of this Court's Commission and Board be included in the audit and not be deliberately segregated therefrom.

In four successive hearings before the Illinois Legislative Audit Commission, an agency of the Illinois General Assembly vested with authority to examine and determine the Respondent's compliance with his constitutional responsibility, during which the Audit Commission sought to ascertain the reasons for the Court's refusal to permit an audit of the funds of the two agencies in question, the Supreme Court, speaking through its Chief Justices and, on other occasions, through its Court Administrator, asserted the aforementioned three grounds upon which it relied. (Legislative Audit Commission hearings, September 28, 1977, January 10, 1978, April 7, 1978 and November 28, 1979.) In a number of other extra-judicial contexts, several members of the Court have voiced the same arguments. (Appendix B attached, "Motion for Recusal and Appointment of Acting Supreme Court—Ex-

planatory Memorandum in Support of Said Motion," etc., pp. 3-5)

Petitioner Madden, for the Court, cannot logically contend that these disqualifying prejudgments are unrelated to the relief sought in this action on the basis that the instant mandamus case concerns only the audit of *appropriated* funds[1]. Respondent suggests respectfully that such an argument would be unsound and unsupported on legal and policy grounds. As noted, Respondent's refusal to audit *partially* the funds appropriated to the Court is based on his conviction that his constitutional duty to audit public funds permits him no discretion to yield to an agency's demand that he make only such a partial audit. Nor is this conviction simply an issue of constitutional interpretation. Accounting philosophy, universally accepted, is grounded upon the rationale that a partial or fragmented audit is the antithesis of public accounting responsibility; that the auditing function requires the submission and evaluation of all relevant financial records of the entity being audited; that anything less would frustrate and dilute the critical objectives of an independent audit. (Am. Inst. of CPA—Professional Standards—supra.) Consider how these principles, valid in the private sphere, take on enhanced urgency when applied to public agencies whose accountability for the receipt and expenditure of public funds is to the people and not to a private corporate entity. (See Article VIII, Section 1(c) Constitution.)

It is clear that the auditing responsibilities of funds appropriated to the Court, and of funds of its Commission and Board employed for the public purposes of governing the admission and regulation of persons engaged in

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[1] The funds which are the subject of the instant proceeding were appropriated by the General Assembly solely to the Supreme Court, not to the "Administrative Office of the Illinois Court" as might appear from a reading of the petition in the instant case. See Roland W. Burris, Comptroller; Illinois Appropriations, 1986, Official Record of All Appropriations; also, P.A. 84-72.

the legal profession, are branches of the same tree, nourished by the same constitutional roots, indivisible in form and function, and subject to the same public interest concerns of governmental fiscal accountability. No other gainful occupation in this state has been similarly placed beyond the reach of the Auditor General's financial review.

The Auditor General has repeatedly made clear that he has no authority or interest in dictating policy relative to the discipline of attorneys and the admission of Bar applicants. He wishes only to fulfill his constitutional duty to audit *all* public funds of *all* state agencies, and to uphold the public's right to be informed.

Respondent's insistence that he cannot engage in a partial audit is sustained not only by the principles and considerations noted, but as well by an official opinion of the Attorney General of the State of Illinois, dated July 20, 1982, dealing with the issue of his authority and duty to audit the funds of the Commission and Board. (See Ruling No. 82022, 1982, p. 57, Ill. Atty. Gen. Opinions.) That decision held that the funds of the two agencies were public funds which the Respondent was constitutionally obligated to audit. It is true that the opinion did not directly address the issue of a divided audit which is the heart of this action. It is also true that the decision, adverse to the Court's own informal opinions, is not binding upon the Court.[2] Nevertheless, the Attorney General's determination that the funds are public funds reinforces the

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[2] However, a final judgment and binding findings in *ARDC, Petitioner v. Heckler, Sec. of HUD and Cronson, Intervenor, Defendant*, 80 C 3974 (U.S.D.C., No. Ill.) confirm Respondent's position and the Illinois Attorney General's opinion. The case involved Social Security coverage of the Commission employees as employees of a state agency. The final judgment and findings of the District Court entered July 6 and 13, 1984 establish that the Commission is an agent, not alone of the Supreme Court but also of the State of Illinois; also, that Commission funds are funds held and controlled by the Supreme Court. The Court properly made clear that it did not adjudicate the audit issue.

Respondent's contention that he cannot, consistent with his constitutional obligation, engage in a partial audit of the nature now insisted upon by the Court.

The Court's previous extra-judicial opinions assert that "public funds" means only funds appropriated by the General Assembly. This opinion totally overlooks settled law and long-standing practice in this State. If permitted to remain unchallenged, it would have a devastating impact upon the public's right to oversee governmental accountability and be tragically destructive of the Respondent's auditing responsibilities. For years beyond memory substantial funds, whether or not in the State Treasury, derived from non-appropriated sources, have been expended without any appropriation. They have been treated as state or public funds for all governmental purposes. These funds have been subject to state audit by the Auditor General.

To illustrate: in the Annual Report of Roland W. Burris, Comptroller of the State of Illinois, for the fiscal year 1984, it is shown that over $4 billion of state funds received in that year were unappropriated by the General Assembly; nevertheless, they were held either in the state treasury, or otherwise by state agencies, as public funds subject to all state regulatory measures including public audit.

Respondent has not audited the funds appropriated to the court since the end of fiscal year 1978 due to his conviction that he may not perform fragmentary or selective audits. Efforts by Respondent to negotiate a settlement of the issue with the Supreme Court were unsuccessful, whereupon he directed all future audits of the Supreme Court to include the funds of the Commission and Board. Respondent further contended that to allow any state agency to dictate a limited audit on its own terms would result in a denigration of the State's constitutional auditing process impairing its independence and integrity and defeating the constitutional goal of public accountability set forth in Article VIII, Section 1.

In the face of all this, the Court, having accepted without previous complaint the Respondent's refusal to audit its appropriated funds since 1978, requested for the first time in December, 1985 through Administrative Director Roy O. Gulley's letter of that date, that the Respondent undertake such a partial audit. The Respondent's refusal sparked the instant litigation.

3. *Respondent Sought In The Supreme Court In 1982-1984 And Subsequently In The Circuit Court Of Cook County To Resolve The Audit Controversy. Respondent Also Sought Recusal Of This Court But That Relief Was Denied.*

The disqualifying bias of the Court in refusing to permit an audit of the funds of the Commission and Board is further based on a strong and completely relevant factual history in yet another sphere of action. On July 26, 1982, the Chicago Bar Association (CBA) filed an action in the Circuit Court of Cook County against Respondent seeking a declaration that Respondent had no authority to audit the funds of the Commission and Board. Its legal grounds precisely paralleled and advanced the Court's long-standing position that its two agencies were exempt from audit. At this point, on August 23, 1982, Respondent sought to expedite a judicial resolution of the issue by filing a Motion for Leave to File a Petition for an Original Writ of Mandamus in the Supreme Court. Since the Circuit Court action would be subject to a time-consuming trial and appellate review, and since the Supreme Court was there, as it is here, the true party in interest and would be such in the mandamus action in the Court, and further since the Court would ultimately be faced with the issues, Respondent believed that the controversy could best be consolidated and determined in an original proceeding in mandamus. Rarely did a cause seem more appropriate for the exercise of the Court's discretion to assume original jurisdiction. At stake then, as it had been for the preceding five years, was a constitutional controversy between the Court and the Auditor

General involving critical constitutional issues respecting the authority of each of those constitutional officers.

The Court, apparently sensitive to the importance of the issues, granted *amici curiae* status to the CBA, the Board and the Chicago Council of Lawyers and invited their suggestions. The Commission, Board and Chicago Council of Lawyers all promptly recommended that the Court grant Respondent's motion and accept original jurisdiction. The CBA alone advised to the contrary and urged the Court to allow the issues to be tried in the case it had brought in the Circuit Court of Cook County, *Chicago Bar Association v. Cronson*, 82 L 50131. On March 19, 1984, nineteen months after the filing of Respondent's threshold motion for leave to file petition for mandamus, the Court, without explanation, in a single sentence order, denied the Auditor General's motion. Respondent then petitioned for reconsideration and moved the Court to recuse itself as permitted by Article VI, Section 16 of the Constitution of Illinois. (See Appendix B attached.)[3] The Court then denied the petition and motion. In effect, this remitted Respondent to the Chicago Bar Association's Circuit Court case which had been stayed pending the Supreme Court's deliberation on Respondent's motion.

One is at a loss to understand not only the Court's denial of Respondent's effort to seek expedited determination of the issue but the extraordinary and inexplicable delay of nineteen months in deciding whether to consider the Auditor General's attempted submission of the matter at all. The Court's decision was and remains unfortunate. Respondent's action sought a resolution of the constitutional issue of his authority to audit the funds of the Commission and Board. A decision on that issue would have resolved the issue in the instant case, namely whether the Respondent has the constitutional authority or obligation to conduct a partial audit. Had the Court accepted jurisdiction on Respondent's motion and determined the

[3] See Motion For Recusal of Court and Appointment of Acting Supreme Court (No. 57179), Appendix B-2 hereto attached, App. pp. 26-28.

issue, either for or against the Respondent, he would have accepted the result, grudgingly perhaps if the decision was adverse, but in fulfillment of his obligation to respect the judicial process. The long-simmering controversy would have been resolved. Instead, with the resumption of the Circuit Court litigation, more than two years have elapsed since the Court's denial of original jurisdiction, and in that period, Respondent's legitimate requests for necessary discovery in the *C.B.A.* case were vigorously resisted by counsel for the CBA, the Commission and the Board. First, more than eight months were to elapse in fruitless and endless arguments relating to a joint Motion to Stay Discovery filed by the Commission and Board to block any and all discovery sought by Respondent.

On June 20, 1985, the Circuit Court (formerly Chief Chancery Judge James Murray presiding) denied their Motion to Stay and ordered discovery responses by the Commission and Board. Further resistance resulted in delays over issues of compliance by the Commission and Board extending to March 13, 1986 when discovery was finally closed. Additional delay ensued when, on January 27, 1986, this Court relieved Judge Murray of his responsibilities in Chancery Court (and thus, in the instant case), appointing him to fill a temporary vacancy in the Appellate Court for the balance of this year. The case will shortly come to decision before a new judge on motions for summary judgment, but there will assuredly be further delays as appellate review is sought by the losing party or parties. There will be continuing uncertainty as to whether the Supreme Court, in the exercise of its discretionary authority, will ever grant Respondent leave to appeal should he be the losing party, or if such leave be granted, whether the Court will, in the light of the above-mentioned and intervening history of bias, be qualified finally to determine the cause as a matter of due process.

The contrast between the nineteen-month delay by the Supreme Court in rejecting Respondent's motion for original jurisdiction and the Court's expedition in granting of Petitioner Madden's motion for the same procedural relief

in the instant cause is significant. Madden initiated this action by Motion filed March 21, 1986, supplemented and completed by a March 26, 1986 filing of a copy of his proposed Petition for Mandamus. Within twenty-four hours after the latter filing, on March 27th, the Court entered its order allowing the motion for leave to file, followed by issuance of summons to Respondent directing him to answer or otherwise plead by April 15, 1986.

Moreover, the attorney filing the instant case also was an attorney for the Chicago Bar Association when it successfully resisted Respondent's motion for leave to file a mandamus petition in 1982. He also was, and is to date, among the counsel for plaintiff in the pending *Chicago Bar Association* case in the Circuit Court, and presently serves as President of the Chicago Bar Association, the lead plaintiff therein.

Respondent respectfully urges that the foregoing facts, particularly (a) the Court's repeated prejudgments of an issue inextricably tied to the issue presented to the Court in this action; (b) the Court's refusal to accept Respondent's motion for an original mandamus on essentially the same controversy in 1982-1983, deferring for nineteen (19) months its denial of Respondent's efforts to secure a total resolution of the controversy; and (c) the Court's contrasting speed in granting in one (1) day Petitioner Madden's motion for leave to file his action against Respondent, establish both directly and by reasonable inference, a due process impediment to the Court's jurisdiction based on the principle of disqualifying bias. Nor is the situation the type of intellectual bias that can be overcome by persuasion and advocacy. Every reasonable indication points to the fact that Respondent's quest for an impartial adjudication is futile.

CONCLUSION

The record of almost nine years of public negation by the Court and its members, of Respondent's right on behalf of the public to audit the funds of the Commission

and Board, offer little or no hope for an ultimately impartial adjudication by the state's highest court, such as is essential to the protection of Respondent's due process rights and the public's right to accountability.

WHEREFORE, Respondent prays for an order or judgment dismissing this cause for want of jurisdiction based on the Court's disqualification on the several due process grounds set forth above.

Respectfully submitted,

ROBERT G. CRONSON, Respondent

By: /s/ SAMUEL W. WITWER, SR.

By: /s/ RUBIN G. COHN and
SAMUEL W. WITWER, JR.

Special Assist. Attorneys General
Attorneys for Respondent

WITWER, MORAN, BURLAGE & WITWER
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

RUBIN G. COHN, Esq.
6 O'Connor Court
Champaign, Illinois 61820
(217) 356-6319

APPENDIX B-2

Being Part Of Appendix B-1 As Filed April 15, 1986 In *Madden, Etc. v. Cronson, Etc.*, No. 63255 — MANDAMUS

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

No. 57179

PEOPLE EX REL. ROBERT G. CRONSON, Auditor General of the State of Illinois,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS, et al.,

Respondents.

MOTION FOR RECUSAL OF COURT AND FOR APPOINTMENT OF ACTING SUPREME COURT

To the Honorable Judges of the Supreme Court of Illinois:

The People *ex rel.* Robert G. Cronson, Auditor General of the State of Illinois, Petitioner herein, by Rubin G. Cohn and Samuel W. Witwer, Sr., Special Assistant Attorneys General, attorneys for Petitioner, move this Honorable Court to recuse itself from the consideration and determination of Petitioner's Petition for Rehearing and Reconsideration of the order denying Petitioner's Motion

for Leave to File Original Petition for Writ of Mandamus, and to appoint an Acting Supreme Court to hear and determine Petitioner's Petition for Rehearing and Reconsideration, and to act in all further proceedings in this Court directly concerning Petitioner's cause, and as grounds for such Motion, state:

1. This Court, having publicly and officially expressed predeterminations of the issues, is disqualified by law from hearing and determining the Petition for Rehearing and Reconsideration, Petitioner's Motion for Leave to File Original Petition for Writ of Mandamus, and all further proceedings in this Court directly concerning Petitioner's cause.

2. Since such predeterminations of the issues were repeatedly, publicly and officially announced as actions of the entire Court, the disqualification necessarily applies to all of its members.

3. This Court has authority under Article VI, Section 16, of the Constitution of Illinois, to appoint an Acting Supreme Court from among other sitting and retired judges of courts of this State.

4. The recusal and appointment of an Acting Supreme Court is consistent with this Court's constitutional duty and judicial interest in protecting the integrity of the Illinois judicial system and the public interest in the impartial administration of justice by the Court.

5. Failure of the Court to recuse itself would constitute a denial of due process to Petitioner by state action under the Constitution of the United States and the Constitution of Illinois through non-action of the judicial branch of state government.

An explanatory memorandum in support of this Motion is attached hereto, together with an affidavit of the Petitioner.

(The explanatory memorandum, being in the nature of a brief, is omitted from this appendix in deference to U.S. Sup. Ct. Rule 21.3).

Respectfully submitted,

ROBERT G. CRONSON, Petitioner

By: /s/ RUBIN G. COHN

By: /s/ SAMUEL W. WITWER (SR.)

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APPENDIX C

SUPREME COURT OF ILLINOIS

CALL OF THE DOCKET, SEPTEMBER 16, 1986

No. 63255 –
William M. Madden, Acting Director of the Administrative Office of the Illinois Courts, petitioner, v. Robert G. Cronson, Auditor General of the State of Illinois, respondent. Oral argument by Richard J. Phelan for petitioner. Submitted. Agenda 31.

Petitioner is given leave to supplement the record with the transcript of a hearing held in the United States District Court for the Central District of Illinois, Springfield, on Friday, September 12, 1986, in Case No. 86-3180, *Cronson v. Clark, et al.* Petitioner is given leave to file a response to respondent's motion to dismiss, which was denied on May 14, 1986. Petitioner is given leave to supplement the record with *Standards of American Institute of Certified Public Accountants, Audit and Accounting Guide.*

No. 63255 – *Madden v. Cronson.*

CHIEF JUSTICE WILLIAM G. CLARK:

The statement that I am about to make is on behalf of the entire court.

On March 27, 1986, this court allowed petitioner, the Acting Director of the Administrative Office of the Illinois Courts, leave to file a petition for an original writ of mandamus to compel respondent, the Auditor General, to conduct an audit of the funds appropriated by the General Assembly and expended by the Administrative Office.

On April 15, 1986, respondent filed a "special and limited appearance for motion to dismiss for want of jurisdiction based on due process grounds." In support of this motion to dismiss, respondent contended that this court lacks jurisdiction in this cause and charged the court with "disqualifying bias."

On June 5, 1986, respondent filed suit in the United States District Court for the Central District of Illinois seeking to enjoin this court from ruling on the instant petition for mandamus relief and made as defendants to the federal court action all seven justices of this court, the instant petitioner, and this court's clerk and informed this court that the Auditor General would not file a brief or otherwise appear before this court.

On September 8, 1986, this court entered an order requesting that the parties appear for oral argument today, Tuesday, September 16, noting the importance of the issues and finding that the public interest would best be served by oral argument.

The United States District Court dismissed the respondent's suit seeking to enjoin this court, and respondent sought a stay before the United States Court of Appeals for the Seventh Circuit. In a letter dated September 16, 1986, respondent's attorney, Special Assistant Attorney General Samuel W. Witwer, wrote to the clerk of this court restating the position of the Auditor General as set forth in his special appearance and motion to dismiss for want of jurisdiction on due process grounds which the Court had previously denied and as set forth in his complaint in the United States District Court, Central District, 86-3180. On September 16, the United States Court of Appeals for the Seventh Circuit denied the respondent's motion to stay the order of the United States District Court.

It is unfortunate that having been denied relief by the United States District Court, and the Court of Appeals for the Seventh Circuit having refused to stay the dis-

trict court's order, the respondent has not appeared and explained why he has no constitutional or statutory duty to audit millions and perhaps hundreds of millions of dollars of taxpayers' funds over a nine-year period. The court believes that because of the important public question and the large sum of taxpayer money involved, the Auditor General, a constitutional officer and officer of this court, and his attorney, Samuel W. Witwer, a special assistant attorney general, had a duty to be present here today.

APPENDIX D

(Letterhead Of)
NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

March 10, 1986

Mr. Richard J. Phelan
Phelan, Pope & John, Ltd.
180 North Wacker Drive, Suite 500
Chicago, Illinois 60601

Dear Mr. Phelan:

You are hereby authorized to appear and you are designated as Special Counsel to the State of Illinois for the fiscal year ending June 30, 1986 for the purpose of representing the Supreme Court of Illinois in filing a mandamus as requested by William M. Madden, Acting Director of the Illinois Courts. The Office of the Attorney General shall take no part in the direction or control of your activities in this litigation. The compensation for your services shall be in accordance with the attached contract.

This appointment is conditional on your compliance with the Attorney General's Code of Conduct as revised April 21, 1981, a copy of which is enclosed.

Please evidence your acceptance of this appointment and its terms by signing the original of this letter in the space provided and return same to this office.

Sincerely,

/s/ NEIL F. HARTIGAN (RVS)
Attorney General

I accept the appointment and agree to its terms. I acknowledge receipt of the Code of Conduct (Rev. 1981), have examined the same this 13th day of March, 1986, and agree to be bound by its terms.

By: RICHARD J. PHELAN

APPENDIX E

Excerpts from Reply of Plaintiffs Chicago Bar Association, et al. (pp. 1-4)

Filed January 13, 1987

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

82 L 50131

THE CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, AND STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, et al.,

Plaintiffs and Counter-Defendants,

vs.

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Defendant and Counter-Plaintiff.

REPLY OF THE CHICAGO BAR ASSOCIATION (CBA), ET AL., PLAINTIFFS, TO SUPPLEMENT TO REPLY OF CRONSON, AUDITOR GENERAL, DEFENDANT

CBA's consistent position throughout this proceeding has been that the Board of Law Examiners and the Attorney Registration and Disciplinary Commission, both established

by Rules of the Illinois Supreme Court (also plaintiffs), are not "State Agencies" but agencies of the Supreme Court, and that their monies, collected from applicants and lawyers, are not "Public Funds".

CBA submits that the foregoing also has been the consistent opinion of the Illinois Supreme Court and its members. That has been apparent from various statements and writings of the Justices and Court Administrators referred to in CBA's previous Memoranda filed in this case.[1] This Court should give due deference to those opinions and follow the same.

---

[1] Among the statements and writings of the Justices and Court Administrators are the following:

* * * * *

In due course, the Court rendered its decision ordering that the Writ of Mandamus, as sought by Madden, issue. In its opinion, through Justice Goldenhersh, a copy of which is attached hereto, the Court addressed the issue of whether the funds of the Board and the Commission were "Public Funds." It said:

> "--- In 1977, the court directed the Board of Law Examiners (Board) and the Attorney Registration and Disciplinary Commission (Commission) to refuse defendant's demand that he be permitted to conduct a performance audit of their records. The refusal to permit the audit was based on the conclusion that since the funds collected and expended by the Board and Commission were not subject to the appropriation provisions of article VIII of the Constitution, they were not "public funds" within the contemplation of article VIII ---"

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CBA's contentions are sound. This Court should find that Cronson does not have any right to audit the funds, books, files and records of the Board or the Commission.

Respectfully submitted,

/s/ RICHARD J. PHELAN

/s/ ROSEANN OLIVER

/s/ JOHN F. MCCARTHY

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The Chicago Bar Association
and others, plaintiffs